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No. 00-73

IN THE

Supreme Court of the United States

JOSEPH M. ANDERSON,

Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 25 U.S.C. § 233 constitutes Congressional abrogation of the sovereign immunity from suit enjoyed by the Tuscarora Nation of Indians.

2. Whether 25 U.S.C. § 233 compels the assertion of jurisdiction over proceedings involving Native Americans irrespective of whether the rights of an Indian Nation would be adversely impaired.

3. Whether federal and state procedural rules that prevent the adjudication of controversies absent the joinder of an indispensable party violate the United States Constitution.

4. Whether the United States Supreme Court should exercise its discretionary jurisdiction to rule on the application of a state procedural rule.

LIST OF AFFECTED PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

A. Joseph M. Anderson.

Petitioner Joseph M. Anderson ("Petitioner" or "Anderson") asserts that he is a member of the Tuscarora Nation of Indians and owns and operates a variety of retail, wholesale, and manufacturing businesses on the Tuscarora Indian Reservation. (Record on Appeal, hereinafter "R." 42).

Petitioner claims that respondent Niagara Mohawk Power Corporation violated a franchise agreement between the company and the Tuscarora Nation of Indians by failing to provide Petitioner with electric service in a non-discriminatory manner, breached an alleged agreement with Petitioner to provide electric service on the Tuscarora Indian Reservation, and violated a New York State statute. (R. 10-11, 41-49).

B. Niagara Mohawk Power Corporation.

Respondent Niagara Mohawk Power Corporation ("Respondent" or "Niagara Mohawk") is an electric and gas corporation organized under the New York Transportations Corporation Law, and is engaged in the generation, transmission, and distribution of electric utility service in New York State. (R. 14, 42).

Niagara Mohawk is a subsidiary of Niagara Mohawk Holdings, Inc. Niagara Mohawk Holdings, Inc. has two subsidiaries: Opinac North America, Inc. and Niagara Mohawk. Opinac North America, Inc. has two subsidiaries of its own: Niagara Mohawk Energy, Inc. (formerly Plum

Street Enterprises) and Opinac Energy Corporation. Opinac Energy Corporation owns fifty percent (50%) of Canadian Niagara Power Company, Ltd. Niagara Mohawk has six subsidiaries of its own: NM Properties, Inc.; NM Receivables Corp. II; NM Receivables, LLC; NM Uranium, Inc.; Beebee Island Corporation; and Moreau Manufacturing Corporation.

C. The Tuscarora Nation of Indians.

The Tuscarora Nation of Indians (the "Tuscarora Nation") is a federally recognized Indian tribe with a Reservation in the State of New York. The Tuscarora Nation is one of six Indian Nations in upstate New York. The six Indian Nations are known collectively as the Haudenosaunee or the "People of the Longhouse." Their confederacy was established around the year 1000 A.D. under the Kaianerekow, that is, the "Great Law of Peace." (R. 69). Under the Great Law of Peace, each nation of the confederacy governs its own territory through a council of chiefs designated by clan mothers. (R. 69).

The Tuscarora Nation continues to maintain its traditional form of government, derived from the Great Law of Peace. The United States Department of Interior, Bureau of Indian Affairs ("BIA") recognizes the Council of Chiefs as the legal governing body of the Tuscarora Nation and Tuscarora Chief Leo R. Henry (Clerk for the Tuscarora Council of Chiefs) as the official spokesperson for the Tuscarora Nation. (R. 147-155). All governmental functions, whether legislative, executive or judicial are concentrated in the Council of Chiefs. The Tuscarora Nation has asserted its right as a sovereign to control utility usage on the Tuscarora Indian Reservation (R. 33-34, 36-37, 39, 40, 533) and has asserted that it is an indispensable party to this

proceeding. (R. 532-550). Petitioner and Niagara Mohawk have both consented to the Tuscarora Nation's submission of an *amicus curiae* brief in opposition to the Petition for Certiorari.

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STATEMENT OF JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the Courts of Appeal and/or state courts of last resort, reflects a departure from the usual course of judicial proceedings, or presents an important question of federal law that has not but should be settled by this Court. For the reasons explained below, Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction.

CONCISE STATEMENT OF CASE

Petitioner's Statement of the Case includes a various misstatements of fact. Respondent offers the following as a correct account of the facts in this case.

A. Background.

For over fifty years Niagara Mohawk provided electric service to qualified applicants of the Tuscarora Indian Reservation pursuant to a 1937 franchise agreement between the Tuscarora Nation and Niagara Mohawk's predecessor in interest (the "Tuscarora Franchise Agreement") (R. 50-52) which granted Niagara Mohawk the franchise to construct, maintain, and operate electrical lines on the Tuscarora Indian Reservation. (R. 13, 33, 50). In August 1993, the Tuscarora Nation asserted its right as a sovereign nation to control utility usage across its borders and on its tribal lands by requiring applicants for new or upgraded electric service to obtain the Tuscarora Nation's prior consent. (R. 33-34, 36-37, 39, 533, 572).

The instant case arises out of efforts by Petitioner, a Tuscarora Native American, to evade the tribal directive that

applicants for electric service on the Tuscarora Indian Reservation must obtain the prior consent of the Tuscarora Nation. Although Petitioner was aware of the tribal directive at the time in which he applied for electric service that forms the basis of the instant proceeding (R. 18-19, 129, 163-164, 211-212), Petitioner chose to disregard the tribal directive. Petitioner took the position that he is not bound by the tribal directive contending that the directive was not an effective or valid action by the Tuscarora Nation (R. 121-128, 167, 211-212, 288) (Petition for Writ of Certiorari, hereinafter "Petition for Certiorari" at 6-7).

On August 17, 1994, Petitioner sued Niagara Mohawk contending that Niagara Mohawk:

> 1.) breached an alleged contract with Petitioner to provide electric service to an approximate six-acre parcel of then undeveloped land located on the Tuscarora Indian Reservation which Petitioner claimed he planned to commercially develop,
>
> 2.) violated the Tuscarora Franchise Agreement (R. 50-52) by failing to provide electric service in a non-discriminatory manner, and
>
> 3.) violated Section 65 of the New York State Public Service Law ("PSL") which provides, in pertinent part, that no electric corporation will subject any person to any undue or unreasonable prejudice or disadvantage.

(R. 10-11, 41-49). Niagara Mohawk has denied all of Petitioner's claims including the existence of a contractual relationship. (R. 233-239).

Subsequent to the commencement of Petitioner's suit, the New York State Public Service Commission ("PSC") determined on April 19, 1995 that the PSL was invalid as applied to the

Tuscarora Reservation (R. 64-65). In January 1996, the Tuscarora Franchise Agreement was declared void *ab initio* by the BIA (R. 66-67, 642, 646, 653-654). In addition, the New York State Appellate Division, Fourth Judicial Department ("Fourth Department"), on two separate occasions, unanimously affirmed dismissal of similar claims asserted by Tuscarora Nation members (including Petitioner) for failure to join the Tuscarora Nation. *Anderson v. Town of Lewiston*, 244 A.D.2d 965, 665 N.Y.S.2d 164 (4th Dept. 1997), *appeal dismissed,* 91 N.Y.2d 920 (1998); *Niagara Mohawk Power Corporation v. Anderson*, 258 A.D.2d 958, 685 N.Y.S.2d 502 (4th Dept.), *appeal dismissed*, 93 N.Y.2d 958 (1999).

B. Lower Court Proceedings.

On March 27, 1998, Niagara Mohawk moved for summary judgment dismissing Petitioner's complaint on various grounds for which there are no material issues of fact in dispute, and moved to reconsider whether this action should be dismissed, pursuant to New York Civil Practice Law and Rules ("CPLR") 1001-1003, for failure to join an indispensable party — the Tuscarora Nation. (R. 7-249). Subsequent to the submission of Niagara Mohawk's motion, the Tuscarora Nation applied for leave to file an *amicus curiae* brief and to participate at oral argument on Niagara Mohawk's motions. (R. 252-254). In its *amicus curiae* brief, the Tuscarora Nation asserted that it would be clearly prejudiced if this matter were to proceed in its absence. (R. 532-550).

The lower court denied Niagara Mohawk's motion for summary judgment and motion to renew, and granted the Tuscarora Nation's motion to file an *amicus* brief. (R. 587). On appeal, the Fourth Department granted the Tuscarora Nation's motion to file a brief *amicus curiae* in support of Niagara Mohawk's appeal and denied Petitioner's cross-motion to dismiss the appeal. In addition, on October 1, 1999, the Fourth Department unanimously reversed the lower court's order and

issued an order dismissing Petitioner's complaint. The Fourth Department's memorandum decision is reported at 265 A.D.2d 817, 696 N.Y.S.2d 736 (4th Dept. 1999). On November 5, 1999, Petitioner served a motion to reargue, or in the alternative, motion for leave to appeal to the New York State Court of Appeals. On December 30, 1999, the Fourth Department denied Petitioner's motion to reargue and motion for leave to appeal to the New York State Court of Appeals. (Petition for Certiorari, Appendix A2). On April 13, 2000, the New York State Court of Appeals denied Petitioner's motion for leave to appeal and awarded Respondent one hundred dollars costs plus necessary reproduction disbursements (Petition for Certiorari, Appendix A1). The New York State Court of Appeals decision is reported at 94 N.Y.2d 764 (2000).

C. The Tuscarora Nation's Directive that Applicants for Electric Service Must Obtain the Nation's Prior Consent.

In August 1993, the Tuscarora Nation asserted its right as a sovereign to control utility usage within the borders of the Tuscarora Indian Reservation by directing that applicants for new or upgraded electric service must obtain the Nation's prior approval or consent. (R. 33-34, 36-37, 39, 533, 572). On behalf of the Nation, Tuscarora Chief Leo Henry advised Niagara Mohawk that the Nation's prior consent to all applications for electric service on the Reservation was necessary to prevent non-enrolled Tuscaroras from residing on the Tuscarora Indian Reservation. (R. 33-34).

The Nation's direction that no electrical service be made within the boundaries of the Tuscarora Indian Reservation without the prior consent of the Tuscarora Nation was stated by Chief Henry in an August 26, 1993 letter to Niagara Mohawk (R. 39) (Reproduced at Appendix A at 1a), and in a September 3, 1993 letter from the Nation's attorneys, the law firm of Borins, Halpern & Stromberg. (R. 40) (Reproduced at Appendix B

at 3a). The September 3, 1993 letter from the Nation's attorneys stated that the Tuscarora Council of Chiefs was concerned that electric service be provided without council approval to a building being erected by Petitioner on Indian Hill Road on the Reservation. *(Id.)* Notice of the tribal consent directive was published in the September 1993 edition of the Tuscarora Health Center Newsletter (R. 162), a copy of which was telefaxed by Petitioner's attorneys to Niagara Mohawk's attorneys on October 18, 1993. (R. 163-164). (A copy of the notice is produced at Appendix C at 5a).

In a letter dated October 22, 1993, Tuscarora Chief Webster Cusick, with Petitioner's collaboration, challenged the Council's action stating that the requirement of tribal consent for the provision of electric service on the Reservation was not the "official action of the Tuscarora Nation" alleging that there have been no Council meetings since 1987. (R. 121-128, 167). Petitioner's contention that the Tuscarora Nation did not require individuals located within its sovereign borders to obtain the Nation's prior consent has already been rejected by the state courts. (*See Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503 ("[i]n 1993 the [Tuscarora] Nation determined [Niagara Mohawk] could provide new updated electrical service only with the permission of the Indian Nation".) (*See also* R. 62).

In November 1993, Niagara Mohawk filed a petition with the PSC to determine, in relevant part, whether the Tuscarora Nation could use its authority as a sovereign to control to whom Niagara Mohawk rendered electric service on the Reservation and thereby transcend various state laws and regulations which prohibit discriminatory utility service practices (e.g., PSL § 65) and whether Niagara Mohawk has an obligation to serve applicants on the Tuscarora Indian Reservation if the Tuscarora Franchise Agreement is determined to be invalid, unenforceable, or subject to control by the Tuscarora Nation (the "PSC Proceeding") (R. 19-20, 170-171).

At or about the same time Petitioner was in the process of making an application to Niagara Mohawk for electrical service which formed the basis of the instant proceeding, the law firm of Zdarsky, Sawicki, & Agostinelli appeared on behalf of Petitioner in the PSC Proceeding. (R. 20, 207). Petitioner was fully cognizant of the position taken by certain Tuscarora Chiefs that the Tuscarora Nation's prior consent was required before new electric service could be provided to applicants, like Petitioner, on the Tuscarora Indian Reservation when Petitioner made his electric service application as evidenced through his December 11, 1993 submission to the PSC. (R. 208-214).

In late December 1993, Niagara Mohawk sent Petitioner an "Electric Service Proposal" dated December 27, 1993 ("ESP") relating to Petitioner's request for new electric power which is the basis for Petitioner's breach of contract claim. (R. 242-243, 257-258). The ESP specifically states that it is conditioned upon the procurement of ". . . all the necessary permits . . . [and] rights of way . . ." (R. 244) (Petition for Certiorari, Appendix A11).

The Tuscarora Nation has consistently maintained since August 1993 (and during the time of Petitioner's electric application) that any new or upgraded electric service provided to applicants on the Reservation requires the prior approval of the Council of Chiefs. (R. 33-34, 36-37, 39-40, 533-535). The Tuscarora Nation's directive was made for various reasons including, but not limited to, preventing non-enrolled Tuscaroras from residing on tribal land and to allow the Tuscarora Nation to enforce its land use and economic development regulations. (R. 33-34, 533). Petitioner did not obtain the consent of the Tuscarora Nation for the provision of new electric service at issue in the instant proceeding (R. 572). Because Petitioner did not satisfy this tribal requirement (*id.*), Petitioner failed to comply with all controlling laws for the provision of power to the Tuscarora Indian Reservation and his business was not energized with new electric service.

In January 1994, Niagara Mohawk advised the Tuscarora Nation that it would not provide electric service to any new applicants on the Reservation pending the adjudication of the company's rights and obligations under the PSL. Niagara Mohawk continued to provide new electric service to applicants with special medical needs and to New York State run facilities upon notice to the Council of Chiefs. (R. 481-482)

D. Result of Proceedings Before the Public Service Commission and the Bureau of Indian Affairs.

On April 19, 1995, the PSC determined that it lacks jurisdiction over Indian reservations, ". . . but upon federal approval of existing signed franchise agreements, Niagara Mohawk will be obligated to provide non-discriminatory service on the Tuscarora and Tonawanda Reservations." (R. 65). The PSC also determined that the PSL was invalid as applied to the Tuscarora Reservation. (R. 64-65). Pursuant to the PSC Decision, Niagara Mohawk submitted the Tuscarora Franchise Agreement to the BIA for its review. (R. 22).

In late January 1996, the BIA determined that the Tuscarora Franchise Agreement was not authorized by Congress and hence was *void ab initio* because it was not approved by the Federal Government as required by Federal "Non-Intercourse" statutory provisions. (R. 66-67). In a decision issued on July 23, 1998, the United States Department of Interior, Interior Board of Indian Appeals ("IBIA") affirmed the BIA's January 29, 1996 decision. (R. 642-645).

Relying upon its prior, recent, and unanimous decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165, and *Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503, and applying the state joinder rules found at CPLR 1001-1003, the Fourth Department determined that the trial level supreme court erred in denying Niagara Mohawk's motion to dismiss for failure to join the Tuscarora Nation. As such, the Fourth

Department did not rule on Niagara Mohawk's appeal of the trial level supreme court's denial of its motion for summary judgment.

REASONS FOR DENYING THE WRIT

The instant case arises out of efforts by Petitioner, a disgruntled Tuscarora Native American who has a long-standing feud with the Tuscarora Nation, to evade the tribal directive of the Tuscarora Nation that applicants for electric service on the Tuscarora Indian Reservation must obtain the prior consent of the Nation for a new or upgraded electric service. (R. 33-34, 36-40, 533-535). Petitioner's contention that "[n]o interest was cited by the Tuscarora Nation that would in any way prevent the parties from adjudicating Anderson's claim for monetary damages" and that ". . . there is absolutely nothing in the record to indicate that the Tuscarora Nation ever opposed Anderson's request for expanded service" (Petition for Certiorari at 5) is untrue and a complete distortion of the record below. The Tuscarora Nation submitted an *amicus curiae* brief to the trial level supreme court, the Fourth Department, and the New York State Court of Appeals in which the Nation explicitly stated that it would be adversely affected should this case proceed in its absence (R. 535-542). In addition, Niagara Mohawk submitted proof that the Tuscarora Nation was opposed to the provision of new electric service to Petitioner and that Petitioner never obtained the prior consent of the Tuscarora Nation as required by tribal law. (R. 18-19, 27, 33-34, 39-40, 162-164, 572-573). Obviously, the Tuscarora Nation would not have submitted *amicus curiae* briefs to the courts below, as well as this Court, seeking to dismiss Petitioner's complaint had the Tuscarora Nation approved that new electric service be provided to a business that Petitioner operates on the Tuscarora Indian Reservation.

There is no conflict in authority between the Courts of Appeal and/or the New York State Court of Appeals nor an

important question of federal law that has not, but should be, settled by this Court. On the contrary, the courts below correctly applied well-established state procedural rules as well as federal and state case law that precludes the litigation of matters in which the rights of an Indian Nation would be adversely impaired or prejudiced. Petitioner's contention that the Fourth Department failed to consider the factors contained in CPLR § 1001 (Petition for Certiorari at 11) is unfounded. The instant proceeding is the third occasion on which the Fourth Department applied the state joinder rules contained in Article 10 of the CPLR and unanimously dismissed virtually identical claims asserted by a Tuscarora Native American (including Petitioner) for failure to join the Tuscarora Nation. *See Niagara Mohawk v. Anderson*, 685 N.Y.S.2d at 503 and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165. Moreover, Petitioner has failed to demonstrate that federal decisional law interpreting the federal joinder rule found at Fed. R. Civ. P. 19 controls a state court's application of its own joinder rule.

Petitioner's argument that the Fourth Department's dismissal order violates 25 U.S.C. § 233 and deprives Petitioner of his constitutional rights both ignores the explicit language contained in 25 U.S.C. § 233 that limits the jurisdiction of the State of New York and distorts well-established federal and state legal principles concerning the sovereign immunity of Indian Nations and the mandatory dismissal of cases where an Indian Nation is an indispensable party. Finally, the relief Petitioner seeks would effectively overturn Fed. R. Civ. 19 and state procedural rules which prohibit the adjudication of a controversy absent the joinder of all indispensable parties, and overturn well-settled case law that precludes the adjudication of claims in which the rights or interests of sovereign nations would be adversely affected. 25 U.S.C. § 233 was never intended to, and does not, cause such a result.

I. The Fourth Department Applied Well-Settled Principles of Federal and State Law when it Dismissed Petitioner's Complaint for Failure to Join the Tuscarora Nation as an Indispensable Party to this Proceeding.

The law pertaining to an Indian Nation's sovereign immunity from suit is well-settled. In *Oklahoma Tax Commission v. Potowatomi*, 498 U.S. 505, 509 (1991), the United States Supreme Court recognized that Indian Tribes were "domestic dependent nations" that exercise inherent sovereign authority over their members and territories, and that they are immune from suit in state courts "absent a clear waiver by the tribe or congressional abrogation." *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 545 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991).

The law pertaining to the joinder of parties is equally well-settled. Federal and New York State procedural rules (Fed. R. Civ. P. 19 and CPLR 1001-1003, respectively) and governing case law prohibit the adjudication of a controversy absent the presence of all indispensable parties[1]. *See e.g.*, *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (Indian tribe is an indispensable party under Fed. R. Civ. P. 19 in an action seeking to enforce a contract

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1. In the Commentary to Fed. R. Civ. P. 19, Professor David Sonenschein notes:

> Rule 19 is the modern version of the former "Necessary and Indispensable Party" rule. Rule 19 provides for compulsory joinder of persons or entities whose absence from lawsuit [sic.] would cause injustice in various listed ways . . . Rule 19(b) . . . provides that where an absent party is one who should be joined under Rule 19(a), but whose joinder is impossible, and where the lawsuit cannot proceed "in equity and good conscience" in its absence, the case must be dismissed. A party in whose absence the case cannot proceed is denominated "indispensable."

signed by the tribe); *Pembina Treaty Committee v. Lujan*, 980 F.2d 542, 545 (8th Cir. 1992) (Indian Nation is an indispensable party to a proceeding which would ". . . imperil the tribe's right to self-governance"); *Enterprise Management Consultants, Inc. v. U.S. ex rel Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (court dismissed action finding that suit against Indian Nation was barred by sovereign immunity and determined, *sua sponte*, that remaining action could not proceed holding that the Indian Nation was an indispensable party); *Niagara Mohawk Power Corporation*, 696 N.Y.S.2d at 503 (Tuscarora Nation is an indispensable party to a proceeding involving electric usage on the Tuscarora Indian Reservation); *Anderson*, 665 N.Y.S.2d at 164 (Tuscarora Nation is an indispensable party to a proceeding involving water usage on the Tuscarora Indian Reservation).

The mandatory dismissal for the non-joinder of a party commonly occurs where the rights of an Indian Nation may be adversely impaired. In *Fluent v. Salamanca Indian Lease Auth.*, the Second Circuit stressed that one factor which is of "paramount importance" in indispensable party analysis under Fed. R. Civ. P. 19 is the doctrine of sovereign immunity. In determining whether to allow plaintiffs' action to proceed without the presence of the Seneca Nation of Indians, the Second Circuit in *Fluent* noted:

> [i]t has been held that when an indispensable party is "immune from suit, 'there is very little room for balancing of other factors' set out in [R]ule 19(b), because immunity 'may be viewed as one of those interests 'compelling by themselves'."

Fluent, 928 F.2d at 548, *quoting Enterprise Management Consultants*, 883 F.2d at 890. The *Fluent* court stressed that ". . . dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent". *Fluent*, 928 F.2d at 548, *quoting Wichita &*

Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777, n.13 (D.C. Cir. 1986).

Applying state joinder rules, the Fourth Department correctly dismissed Petitioner's complaint finding that the Tuscarora Nation is an indispensable party to the adjudication of Petitioner's claims. *Anderson*, 696 N.Y.S.2d at 737. The Fourth Department correctly reasoned that the Tuscarora Nation is an indispensable party because the issues presented directly and fundamentally affect the Tuscarora Nation. Resolution of Petitioner's claims which assert that Niagara Mohawk is obligated to serve a business that Petitioner operates on the Tuscarora Indian Reservation would directly contravene the Tuscarora Nation's directive that applicants for electric service obtain the Tuscarora Nation's prior consent as a prerequisite to the receipt of new or upgraded electric service.

Petitioner's contention that the Tuscarora Nation cannot be inequitably affected by a money judgment against Niagara Mohawk (Petition for Certiorari at 13) is fatally flawed. The fact that Petitioner does not seek any relief from the Tuscarora Nation is immaterial because the Nation will be prejudiced if a finding of liability results in this case. The Tuscarora Nation has a vital interest in this case because a core element of its sovereignty as an Indian Nation is to regulate access to and the provision of electric or other services on its territory. At the heart of Petitioner's claims against Niagara Mohawk is a challenge to the Tuscarora Nation's power to control and regulate its borders and territory. The Tuscarora Nation would be directly and inequitably affected by any adjudication of Petitioner's claims in its absence because such adjudication assumes the power and jurisdiction of the court to supersede the Nation's sovereign authority over its own borders and territory. If the Tuscarora Nation's directives as to access to its own territory can be overridden by a court, the Nation's sovereignty is, by definition, violated. That is the essence of this dispute.

It is well-settled that there is nothing more fundamental to sovereignty than the right of an Indian nation to control access to its territory and borders and to regulate its internal affairs. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). *See also* Felix S. Cohen, *Handbook of Federal Indian Law*, Ch. 4, Sec. C5 at 252 (1982 ed.).

Petitioner's contention that no evidence was presented to demonstrate a legitimate interest on the part of the Tuscarora Nation and that "there is no evidence in the record to show any indication that the Nation did not consent to Anderson's contract for expanded service at his Route 31 location [on the Tuscarora Indian Reservation]" (Petition for Certiorari at 13) distorts the Record below. Niagara Mohawk submitted conclusive and uncontroverted evidence that the Tuscarora Nation asserted its right as a sovereign to control its borders and prevent Niagara Mohawk from providing electric service to applicants located on the Tuscarora Indian Reservation without the Nation's prior approval or consent (R. 18-19, 27, 33-34, 39-40, 162-164), that the Nation was specifically opposed to the provision of electric service to another business Petitioner operates on the Tuscarora Indian Reservation (R. 40), and that the Nation did not consent to the provision of new electric service to the property that Petitioner planned to commercially develop that is at issue in this proceeding (R. 572-573). Notably, the Electric Planner assigned to Petitioner's application for electric service testified:

> 5. . . . Since [Petitioner] was requesting new electric service to a location on the Tuscarora Reservation, I understood that [Petitioner] needed to obtain the prior consent of the Tuscarora Nation before Niagara Mohawk could make the necessary electrical connections and energize the location . . .
>
> 8. My records do not indicate that [Petitioner] ever received the prior consent of the Tuscarora Nation in connection with his request for new electric service that forms the basis of this lawsuit.

> 9. It is the ultimate responsibility of an applicant to obtain all necessary permits, rights-of-way, and the like before Niagara Mohawk can run the necessary equipment, wiring, and hardware to the location.

(R. 572-573).

Moreover, the Tuscarora Nation itself submitted *amicus* papers at the trial court (R. 529-550), the Fourth Department and the New York State Court of Appeals arguing that Petitioner's complaint cannot proceed in the Nation's absence. The Tuscarora Nation explicitly stated that it is an indispensable party to any legal proceeding regarding utility usage on the Tuscarora Indian Reservation, and that, consequently, no legal proceeding may proceed without its presence. (R. 532). In addition, the Tuscarora Nation explicitly asserted that it would be clearly prejudiced if **this** case were to proceed in its absence. (R. 534-542). The Tuscarora Nation's directive was to prevent non-enrolled Tuscaroras from residing on tribal land (R. 33-34) and to allow the Nation ". . . to enforce regulations pertaining to land use and economic development on the Reservation" (R. 533). The Tuscarora Nation's participation as a party in the adjudication of Petitioner's statutory claims is required because a judgment in favor of Petitioner would involve a determination of the Nation's rights and powers and would violate its sovereignty as an Indian Nation. Petitioner's contention that the sworn testimony of Tuscarora Chief Webster Cusick is directly contrary to Niagara Mohawk's position (Petition for Certiorari at 13) is false. On the contrary, Chief Cusick testified that Petitioner was aware of the tribal consent requirement before Petitioner contacted Niagara Mohawk for new electric service (R. 129).

There is nothing in the record to support Petitioner's contention that the *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, matter is "moot" because "the Town of Lewiston never followed through on its threat to shut off plaintiffs' [sic] water

in that case." (Petition for Certiorari at 14). The fact that *Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503, and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165, were not accepted for review by the New York State Court of Appeals, in no way means that the issues implicated by the Tuscarora Nation's sovereign immunity and its status as an indispensable party had not been considered by New York or federal courts.

In the instant proceeding, neither Petitioner nor Niagara Mohawk can adequately represent the interests of the Tuscarora Nation. Notably, it is in Niagara Mohawk's interest as a seller of electricity not to be bound by the Tuscarora Nation's constraints with respect to the delivery of electricity to applicants located on the Tuscarora Indian Reservation. Petitioner is also in an adverse relationship to the Tuscarora Nation both with respect to the issue at bar and his long-standing feud with the Nation as evidenced by Petitioner's historical disregard for tribal laws and actions to further his own self-interests. As described by Robert B. Porter:

> By 1994, Anderson had developed a new plan for effectuating business development within the Tuscarora Nation — he initiated efforts to overthrow the Council of Chiefs and to establish a new form of government, the "Tuscarora Tribal Business Council."

Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee, 46 Buff. L. Rev. 805, 882 (Fall 1998). *See also* Agnes Palazzetti, *Indian-made Gasahol, Cigarettes at Issue*, The Buffalo News, May 1, 1997, at 1B ("But Anderson refuses to recognize Chief Leo Henry, who signed the agreement [with the State of New York relating to State of New York's efforts to enforce tax laws] for the Tuscaroras as the leader of the Chief's Council. Anderson . . . also refuses to apply for a tribal business license as stipulated in the Agreement"); Agnes Palazzetti, *Chiefs*

Launch Effort to Close Bingo Hall, The Buffalo News, March 18, 1994 (" . . . the Chief's charged that Anderson was defying the Tuscarora's traditional laws that forbid any form of gambling on Tuscarora territory"); Agnes Palazzetti, *Rebels Launch Campaign to Remove Tribal Chiefs, Want Federal Bureau of Indian Affairs to recognize new Governing Bodies*, The Buffalo News (March 27, 1994) ("In defiance of the Chief's Council, Anderson . . . formed a new government which authorized the bingo games . . .")

In short, the Fourth Department decision does not reflect a *per se* ban, but rather recognizes the fact that given the threat to the Tuscarora Nation's sovereignty, the prejudice which may accrue from the non-joinder of the Nation is significant, and the case may not proceed without the Nation's presence.

II. The Dismissal Order of Petitioner's Complaint does not Conflict with 25 U.S.C. § 233.

Petitioner's contention that the Fourth Department's dismissal order conflicts with Congress' grant of jurisdiction to New York courts 25 U.S.C. § 233 over civil disputes between Indians and non-Indians in violation of the Supremacy Clause of the United States Constitution (Article VI, Cl. 2) and deprives Petitioner of due process or equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Petition for Certiorari at 12-16) has already been addressed on numerous occasions by federal courts in applying the indispensable party analysis found at Fed. R. Civ. P. 19 to Indian Nations. Federal courts have consistently recognized that the application of the law relating to indispensable parties may leave no forum available for the resolution of the claims asserted. As noted earlier in *Fluent*, "[t]he Appellants' contention that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail . . . 'Sovereign immunity may leave a party with no forum for [that party's] claims'." *Fluent*, 928 F.2d at 547.

25 U.S.C. § 233 does not constitute Congressional abrogation of a Tribe's immunity from suit. Rather, in enacting 25 U.S.C. § 233 Congress specifically limited the jurisdiction of New York State courts ". . . to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings . . ." That is, the state joinder rules found at CPLR 1001-1003 still apply, as does the case law with respect to the Tuscarora Nation's sovereign immunity from suit as an Indian Tribe.

In *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) (Petition for Certiorari at 12), United States District Judge Richard Arcara discussed in length the history, intent and meaning of 25 U.S.C. § 233. After reviewing relevant law and well-established principles applicable to a sovereign nation, Judge Arcara held that 25 U.S.C. § 233 did not constitute abrogation of an Indian Nation's sovereign immunity from suit:

> These cases all support the proposition that an Indian Tribe's right to self-government cannot be abrogated absent an unequivocal expression of Congress' intention to do so. Section 233 is not such an expression. The plain language of § 233 does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of the Nation's government. If it were Congress' intent to allow the State Courts to have jurisdiction over such disputes, it would have expressly said so, but it did not. Significantly, § 233 does not provide for State Court jurisdiction over suits against the Nation itself. Had Congress intended to abrogate the Nation's rights to self-government and exclusive jurisdiction over internal affairs, it would have made sense for Congress to provide for State Court jurisdiction over suits against the Nation.

Bowen, 880 F. Supp. at 118.

As set forth above, the Fourth Department did not ". . . disassociate [itself] from federal law or refuse to exercise jurisdiction bestowed by Congress because they have a disagreement with the federal law or refusal to recognize the superior authority of its source." (Petition for Certiorari at 15). On the contrary, the Fourth Department correctly applied well-settled principals of federal and state law which precludes the adjudication of a controversy in which the rights of an Indian Nation would be adversely impaired.

Petitioner's reliance upon *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 380 (1990); *Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); and *Mondue v. New York N.H.&H.R. Co.*, 223 U.S. 1, 58 (1912) at page 15 of his Petition is well off the mark. As stated above, 25 U.S.C. § 233 does not constitute congressional abrogation of the Tuscarora Nation's sovereign immunity from suit. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59 (quotation omitted). 25 U.S.C. § 233 is devoid of an implicit (let alone an explicit) waiver of the Tuscarora Nation's sovereign immunity from suit, nor does 25 U.S.C. § 233 mandate the assertion of jurisdiction in every case involving a Native American irrespective of the joinder rules and case law relating to sovereign immunity from suit. On the contrary, 25 U.S.C. § 233 explicitly limits the jurisdiction of the courts of the State of New York "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings. . . ."

Petitioner's contention that the dismissal order

> . . . deprive[s] Native Americans of their Fifth and Fourteenth Amendment rights to due process and equal protection of the laws, in contravention of the principles established by the Court beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956) (access to

> appeals in criminal cases) and *Boddie v. Connecticut*, 401 U.S. 371 (1971) (access to the judicial process in civil cases)

(Petition for Certiorari at 15) is also well off the mark. Notably, neither of these cases involved the threat to Indian sovereignty at issue in this proceeding. On the contrary, at issue in *Boddie* were certain state procedures requiring the payment of filing fees as a prerequisite to the commencement of litigation which welfare recipients alleged restricted their access to courts to bring actions to dissolve marriages. In reversing a determination upholding the state statute, this Court held:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Boddie, 401 U.S. at 784.

Although this Court overturned the state procedure, this Court took special care to note that the Due Process Clause does not create an absolute right to civil redress through the judicial process. Indeed, if that were the case, Fed. R. Civ. P. 19, similar state procedural rules relating to the joinder of indispensable parties, and well-settled case law that precludes the adjudication of controversies in which the rights of an Indian Nation are prejudiced would have been overturned by the *Boddie* case. Instead, the *Boddie* court stressed:

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court

> to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. *We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive pre-condition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus, we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.* (Emphasis added.)

Boddie, 401 U.S. at 788-89.

Petitioner's comparison between the dismissal order in this case and in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999) (Petition for Certiorari at 17) is strained. As described above, 25 U.S.C. § 233 is still subject to the doctrines and legal principles of sovereign immunity and joinder of necessary parties. Indeed, in *Thomas*, the Seventh Circuit explicitly detailed Congress' exercise of its powers to qualify or limit the tribal sovereignty with respect to elections affecting tribal constitutions. The Seventh Circuit stated, "the IRA (Indian Reorganization Act) explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions." The Seventh Circuit held that by passing 25 U.S.C. § 476 in its present version:

> Congress thereby refused to reflect the tribal interest in the legal structure of tribal constitution elections, notwithstanding the core values of government and self-determination to the tribal constitution necessarily embodies.

Thomas, 189 F.3d at 668.

Congress' exercise of its power to carve out an interest from the Tribe's sovereign immunity in the IRA is entirely different than what exists in 25 U.S.C. § 233, which in no way limits an Indian Nation's sovereign immunity from suit. Moreover, as contrasted with the statute at issue in *Thomas*, Congress took special care in enacting 25 U.S.C. § 233 to limit the jurisdiction of New York State courts: ". . . to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings . . ."

In sum, the Fourth Department's unanimous decision was consistent with its prior unanimous decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164 and *Niagara Mohawk v. Anderson*, 685 N.Y.S.2d at 503, and longstanding case law which precludes the adjudication of claims, absent Congressional abrogation or tribal consent, which may impair, impede, or prejudice the rights of an Indian Nation.

III. The Fourth Department's Order does not Conflict with Federal Circuit Courts of Appeals Decisions. The Fourth Department Decision Follows Well-Settled Principles of Federal and State Law.

There is no conflict with a prior decision of this Court, or a conflict of authority between the Courts of Appeal (Petition for Certiorari at 16-18) or state courts of last resort. As detailed in Point I, *infra*, the Fourth Department applied well-settled principles of federal and state law in dismissing Petitioner's complaint for the non-joinder of the Tuscarora Nation.

The Fourth Department correctly relied upon its prior decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, and *Niagara Mohawk Power Corp. v. Anderson*, 685 N.Y.S.2d at 503, which similarly and unanimously affirmed dismissal of claims relating to utility usage by a Tuscarora Native American on the Tuscarora Indian Reservation for the non-joinder of the Tuscarora Nation.

Petitioner erroneously contends that the Fourth Department's order conflicts with *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000); *Thomas*, 189 F.3d at 662; and *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (Petition for Certiorari at 16-17). Initially, Petitioner has failed to establish that the Fourth Department was required to apply federal decisional authority to the state procedural rules (CPLR 1001-1003) forming the basis of the dismissal of this proceeding. Notably, the Petitioner chose the state court forum. In doing so, Petitioner became subject to the state procedural rules, including the state procedural rules regarding necessary parties and the interpretation of those rules by the state courts. Even recognizing that the state procedural rule was modeled on the Federal Rules of Civil Procedure, nonetheless, the rule is a *state procedural rule*. The interpretation by the Fourth Department of the state procedural rule does not create any conflict with federal law, the Federal Rules of Civil Procedure, or federal court decisions interpreting the Federal Rules of Civil Procedure. The fact that a state court may interpret a state procedural rule modeled upon a federal rule in a manner which is not the same as a federal court interpretation of the federal rule upon which the state rule is modeled does not constitute a violation of any federal right and does not create a conflict between state court decisional authorities and federal court decisional authorities which justifies, much less compels, the exercise of this Court's discretionary authority to review a state court decision.

Notwithstanding the foregoing, as set forth in Point I, *infra*, the Fourth Department did not commit any error in resolving the issue of the status of the Tuscarora Nation as an indispensable party to the state court proceeding.

Petitioner incorrectly cites the "holding" of *Bassett*, 204 F.3d at 343, at page 16 of his Petition for Certiorari. The Second Circuit in *Bassett* did not hold ". . . that a tribe was not an indispensable party to a film producer's contract, tort, and copy infringement claims." (Petition for Certiorari at 16). Although the Second Circuit found that the lower court incorrectly dismissed the film producer's tort and copy infringement claims for non-joinder of the tribe, the Second Circuit did **not** hold that plaintiff could proceed with his breach of contract claims (the claim at issue in this proceeding) as a matter of law absent the joinder of the tribe. Instead, the Second Circuit remanded the matter to the lower court for reconsideration as to whether the breach of contract claims may be maintained absent the joinder of the tribe. *Bassett*, 205 F.3d at 360. Although the Second Circuit found that the lower court abused its discretion as a matter of law in dismissing plaintiff's copyright infringement and tort claims given the non-joinder of the tribe, with respect to the treatment of the breach of contract claims, the Second Circuit noted:

> Somewhat different concerns are raised by the district court's finding that the Tribe is an indispensable party to [plaintiff's] claim of breach of contract against the Museum. *Claims for breach of contract may be more susceptible to dismissal under Rule 19(b) than claims sounding in copyright and tort*, as the individual responsibility of each actor is defined by the contract and does not necessarily result in joint and several liability. *There may be better reasons to support a dismissal under Rule 19(b) as to the contract claim*. But once again,

> the district court furnished no analysis that could guide our review. (Emphasis added.)

Id.

Moreover, the *Bassett* matter is clearly distinguishable from the case at bar because it did not involve an Indian Nation's right to self-governance nor an Indian Nation's sovereign right to control its borders at issue in the instant proceeding.

The fact that the Fourth Department did not explicitly "explain how the Tuscarora Nation's interest might be harmed" (Petition for Certiorari at 16-17) does not establish "compelling" reasons for this Court to grant certiorari. Aside from the fact that the Fourth Department was not required to apply federal decisional law to the state procedural rule, the instant proceeding was the *third* occasion in which the Fourth Department ruled on an identical issue. As such, the Fourth Department was intimately familiar with the legal issue. In dismissing Petitioner's complaint for the non-joinder of the Tuscarora Nation, the Fourth Department explicitly relied upon its prior decisions in *Niagara Mohawk Power Corp. v. Anderson*, 685 N.Y.S.2d at 503, and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165. In its prior decision of *Niagara Mohawk Power Corporation v. Anderson* (decided less than eight months prior to its decision in the instant proceeding), the Fourth Department explained that dismissal of counterclaims alleging that Niagara Mohawk wrongfully failed to provide utility service on the Tuscarora Reservation for failure to join the Tuscarora Nation was required:

> Because resolution of this controversy involves a determination of the rights and powers of the Indian Nation to consent to [electrical] service on its Reservation, complete relief cannot be accorded [defendant and intervenors] without the Indian Nation as a party. Furthermore, because a judgment in [defendant's and intervenors'] favor would

> challenge the power of the Indian Nation, the Indian Nation might be 'inequitably affected' by this litigation.

Niagara Mohawk Power Corp., 685 N.Y.S.2d at 503, *quoting Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, *citing City of New York v. Long Is. Airports Limousine Serv. Corp.*, 48 N.Y.2d 469, 475, 476 (1979).

Petitioner's citation to *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (Petition for Certiorari at 17) for the proposition that the Seminole Indian Nation was not a *per se* indispensable party to a proceeding involving the establishment of rights to tribal trust funds wrongly implies that the Fourth Department found that Tuscarora Nation was a *per se* indispensable party. The Fourth Department did not hold that the Tuscarora Nation is an indispensable party merely because of its status as a sovereign nation. On the contrary, the Fourth Department relied upon its prior decisions in *Niagara Mohawk Power Corp. v. Anderson* and *Anderson v. Town of Lewiston* which held that the Tuscarora Nation was an indispensable party to proceedings involving utility service to the Tuscarora Indian Reservation finding on both occasions that the Nation might be prejudiced should the case proceed in its absence.

IV. The Relief Petitioner Seeks Would Overturn Federal and State Procedural Rules Which Prohibit the Adjudication of a Controversy Absent the Joinder of an Indispensable Party.

Petitioner's contention that the dismissal order results in a jurisdictional void (Petition for Certiorari at 18-19) ignores a plethora of case law (referenced at Point I, *infra*.) which precludes the litigation of suits in which an Indian Nation is an indispensable party to the proceeding. Indeed, courts have consistently recognized that the application of the law relating to indispensable parties may leave no forum available for the

resolution of the claims asserted. The Second Circuit explained in *Fluent*:

> [T]he Petitioners' contention that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail . . . "sovereign immunity may leave a party with no forum for [that party's claims]."

Fluent, 928 F.2d at 547.

Moreover, the relief Petitioner seeks would overturn Fed. R. Civ. P. 19, state procedural rules relating to the joinder of parties, and well-settled case law relating to the sovereign immunity doctrine.

In short, Petitioner has failed to establish compelling grounds for this Court to exercise its discretionary jurisdiction.

CONCLUSION

For the aforesaid reasons, Respondent Niagara Mohawk Power Corporation respectfully prays that the Petition for Writ of Certiorari filed by Petitioner Joseph M. Anderson be denied.

Respectfully submitted,

MARK R. MCNAMARA
Counsel of Record
SAMUEL J. BURRUANO, JR.
HISCOCK & BARCLAY, LLP
Attorneys for Respondent
Niagara Mohawk Power Corporation
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(716) 856-0911

APPENDIX

APPENDIX A — LETTER FROM TUSCARORA CHIEF LEO R. HENRY TO GERALD O'NEILL DATED AUGUST 26, 1993

HAUDENOSAUNEE
TUSCARORA NATION
2006 MT. HOPE ROAD —
VIA: LEWISTON, NEW YORK 14092

August 26, 1993

Mr. Gerald N. O'Neill
District Manager
Niagara Mohawk Power Corporation
1720 New Road
Niagara Falls, New York 14304

Dear Mr. O'Neill:

"GREETINGS"

I extend "Greetings" on behalf of the Chiefs, Clan Mothers and the People of the Tuscarora Nation. We wish to thank you for your time and understanding as we met with you and Mr. Mitchell on August 24, 1993 regarding service within the territory of the Tuscarora Nation and the discussion of the contract.

This is to reaffirm the Councils position and our agreeing that, that NO electrical service will be made within the territory of the Tuscarora Nation without the written consent, (authorization) of the Tuscarora Chiefs in Council. If you have any questions, feel free to call. Further we look forward

to future meetings regarding the contract and other matters discussed.

Thank you for your cooperation, and we look forward to meeting in the near future.

ONEH!

s/ Chief Leo R. Henry
Chief Leo R. Henry, Clerk
Tuscarora Nation

cc:Murdock Mitchell

APPENDIX B — LETTER FROM KIMBERLY SCHECHTER TO GERALD O'NEILL DATED SEPTEMBER 3, 1993

BORINS, HALPERN & STROMBERG
ATTORNEYS AT LAW
OFFICE AND MAILING ADDRESS
418 BRISBANE BUILDING
603 MAIN STREET
BUFFALO, NEW YORK 14203

TELEPHONE (716) 854-5600
TELECOPIER (716) 854-4512

* * *

September 3, 1993

Gerald O'Neill
District Manager
Niagara Mohawk Power Corporation
1720 New Road
Niagara Falls, New York 14304

Re: Applications for service to the Tuscarora Indian Reservation in Lewiston, New York

Dear Mr. O'Neill:

I am writing to confirm our telephone conversation of today. As I stated, we represent the Tuscarora Indians living on the reservation in Lewiston, New York. I understand that you have met with various chiefs from the reservation concerning utility hook-ups. You have advised the chiefs

that Niagara Mohawk will honor, until further notice, an agreement not to hook up any service whatsoever on the Tuscarora reservation until written approval has been obtained from the Council of Chiefs. They are particularly concerned that service will be supplied, without council approval, to a building being erected by Joseph Anderson at Route 104 and Indian Hill Road to be used as a bingo hall.

I further understand that your policy may change, depending on the outcome of Niagara Mohawk's lawsuit concerning the Seneca Nation's Tonawanda Reservation, or other factors, and request that if your policy in relation to either the Tuscarora or Tonawanda Indian reservation changes, that you notify this office immediately.

Thank you.

Very truly yours,

s/ Kimberly Schechter
Kimberly Schechter

KS/ac
cc/Chief Leo Barry
Chief Bernard Parker

APPENDIX C — EXCERPT FROM SEPTEMBER 1993 EDITION OF THE TUSCARORA HEALTH CENTER NEWSLETTER

TUSCARORA HEALTH CENTER NEWSLETTER

* * *

NEWS FROM THE REZ

NOTICE

A meeting was held on August 24, 1993, between Members of the Tuscarora Nation's Council of Chiefs and representatives of the Niagara Mohawk Power Corp.. Until such time, it was agreed by both parties that as of the above date, no electrical services will be made by the Niagara Mohawk Power Corp. within the territory of the Tuscarora Nation, without the specific written concent of the Tuscarora Chief's Council.

* * * *